

No. 14,518

United States Court of Appeals
For the Ninth Circuit

NAT YANISH,

Appellant,

VS.

BRUCE G. BARBER, District Director,
Immigration and Naturalization
Service,

Appellee.

APPELLANT'S CLOSING BRIEF.

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APPELLANT'S CLOSING BRIEF.

INTRODUCTION.

In his Opening Brief Appellant posed the question before this Court in the following manner:

“When a respondent is found in contempt of a court order and when the record shows that petitioner has suffered damages as a result of that contempt, may a trial court refuse to impose sanctions on respondent or award reparation to petitioner?” (*Opening Brief*, pp. 4-5.)

Appellee, as he must, accepted the question thus posed. (Appellee's Brief, p. 7.) But to this question, Appellee says little or nothing to meet or rebut the impact of Appellant's solid legal and factual position.

Rather Appellee appears deliberately to miss the point, and thus to display the utter poverty of his position. He almost ignores the basic fact that he is in contempt of court and that his contempt has caused substantial damage and injury to Appellant including imprisonment for a period of over two months. He beclouds the issue with a re-argument of the basic law of this case which was decided adversely to him by this Court in *Yanish v. Barber*, 211 Fed. (2d) 467. Finally, he raises, without discussion or analysis, a captious query to the jurisdiction of this appeal.

JURISDICTION.

Appellee states that the Order from which this appeal is taken is a non-appealable order. However the cases cited by Appellee do not sustain that position. It is true that the contempt of which Appellee was guilty was a civil contempt. However it does not follow therefrom or from the cases cited by Appellee that a civil contempt order is nonappealable. In the cases cited the contempt proceeding had been commenced prior to judgment in the main action. Here the judgment in the main action is a final one from which no appeal has been taken. The contempt was committed a long time after this judgment had become final. Thus the Order of the District Court in this case refusing to impose sanctions upon Appellee and to award reparation to Appellant *finally* denied the relief sought by Appellant in this contempt proceeding. The Order therefore was a final one and

appealable as a final order. (*Lamb v. Cramer*, 285 U.S. 217, 220, 221.)

**APPELLANT'S IMPRISONMENT WAS OCCASIONED SOLELY
BY HIS REFUSAL TO YIELD TO ILLEGAL AND CONTEMP-
TUOUS DEMANDS OF APPELLEE.**

Appellee calls the attention of this Court, in some detail, to the fact that during the critical period of March 1953, the deportation order against Appellant became final a few days before he was incarcerated by Appellee. The inference intended is that the cause for imprisonment is to be found in that fact and not in the fact of Appellee's contempt. The intended inference is at variance with the prior opinion of this Court:

“Petitioner (Yanish) was in fact taken into custody on March 17, 1953 for failure to furnish the bond demanded * * *”

(211 Fed. (2d) at footnote 3, p. 409.)

It is also at variance with Appellee's sworn testimony in the proceeding from which this appeal is taken. Appellee testified that he received a general directive shortly after January 14, 1953, almost 60 days *before* the deportation order became final, in accordance with which directive he demanded that Appellant post a new bond containing the objectionable conditions and imprisoned Appellant for his refusal to accede to this demand. (Record, pp. 52-55.) His only testimony concerning the finality of the deportation order is a statement, in response to a lead-

ing question, that he knew the deportation order had become final. (Record, p. 55.) Under cross-examination he testified definitely that the instructions under which he acted to require the new bond conditions and to take Appellant into custody, were the instructions received shortly after January 14, 1953. (Record, p. 61.)

The fact is that Appellant was imprisoned for one reason and one reason only: His refusal to yield to Appellee's demand of March 9, 1952, that he agree to conditions of bond forbidden by Judge Lemmon's "valid and subsisting" injunction.

Characterization of Appellee's conduct as "technical contempt¹ cannot detract from its contemptuous nature. Nor can it relieve him of responsibility for the events that flowed directly from it and were part of it. Nor can it relieve him of responsibility for the damages thereby incurred by Appellant.

With these basic facts in mind, the balance of Appellee's argument lacks all persuasion and is shown to ignore the real issue in this case. Thus it is patent that Appellee's acts were not authorized by law or within the scope of his authority.² His acts were not authorized by the Immigration and Nationality Act of 1952 (P.L. 414, 8 USC §§1101, et seq.), as Appellee contends, because this Court has already held that they were not. Nor were his acts permitted by Judge Lemmon's injunction, because the District Court has

¹Appellee's Brief, pp. 8-10.

²Appellee's Brief, pp. 13-17.

already finally held that they were not. Appellee does not and cannot point to any other law or decision which authorized his acts. Being unlawful, *a fortiori*, they could not have been within the scope of his authority.

It follows, therefore, that the refusal of the District Court to impose sanctions and award reparation constitutes "a refusal to apply well settled principles of law" to which refusal legal discretion does not extend.

Union Tool Co. v. Wilson, 259 U.S. 107, 112;

Parker v. U. S., 153 Fed. (2d) 66, 70, C.A. 1;

Ingraham Co. v. Germanow, 4 Fed. (2d) 1002, C.A. 2;

Enoch Morgan's Sons Co. v. Gibson, 122 Fed. 420, 423;

In re Sylvester, 41 Fed. (2d) 231, D.C.N.Y.

There is no law to the contrary. Cases cited by Appellee³ do not either in holding or as quoted by Appellee support his position. They are either *not* in point or as in the case of *Union Tool Co. v. Wilson*, *supra*, actually support Appellant's position.

CONCLUSION.

Appellee has been found in contempt of Court. His contempt caused Appellant among other things, to be deprived of his liberty for a period of more than two months. For this and his other damage he is entitled to reparation in the form of a compensatory fine.

³Appellee's Brief, pp. 12-13.

The failure of the Court below to award such reparation was clear error and requires a reversal of its judgment on that issue.

Dated, San Francisco, California,
July 15, 1955.

Respectfully submitted,
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